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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1928.

No. 454.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

JOHN ROCK,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND/OR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

HERBERT H. PATTERSON,
Counsel for Respondent.

CHAMPLIN LAW PRINTING COMPANY, CHICAGO

(33,763)

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to the Supreme Courts, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in said Appellate Courts it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court: * * *"

The complete record in this case discloses that no certificate of importance was ever asked for or denied in the Appellate Court of Illinois. That court had before it the entire record of the proceedings, and it might have granted a certificate of importance, in which event the Supreme Court of Illinois would have taken the case and passed judgment upon it. The defendant did, however, petition the Supreme Court of Illinois for a writ of certiorari. The petition was denied, and the court never took the case for review and determination. Petitioner, therefore, did not, in accordance with Volume 43, Section 237, Par. I, United States Statutes at Large, page 937, exhaust in the state courts the means at hand for obtaining "a final judgment or decree * * * in the highest court * * * in which a decision in the suit could be had. * * *"

In *Fisher* v. *Perkins*, 122 U. S. 522, under like circumstances, it was held:

> "The want of a certificate is good reason for refusing to allow an appeal, but until it has been asked for and refused, its absence furnishes no ground for a writ of error from this court."
>
> "As it is, we find nothing in the record to show that the suit could not have been taken to the Court of Appeals if the necessary application had been made, and, consequently, we have no right to proceed. * * * The judgment is still the judgment of the Superior Court, which is not the highest court of the state, and it might have been taken to the Court of Appeals for review if the grant of an appeal had been applied for and secured."

Although the defendant took one and not the other of two courses open to it and filed its petition for writ of certiorari in the Supreme Court of Illinois, still the judgment against it might have been taken to the Supreme Court of Illinois for review if the Appellate Court of Illinois had been asked to and had granted a certificate of importance. Everything was not done that could be done to take the case to the highest court of the State of Illinois.

Gregory v. *McVeigh*, 23 Wall, 294.

Stratton v. *Stratton*, 239 U. S. 55.

The denial of petitioner's petition for writ of certiorari by the highest court of the State of Illinois is not such a judgment of such court as may be reviewed by the Supreme Court of the United States by writ of certiorari, since petitioner failed to make application to the Appellate Court for a certificate of importance which, if granted, entitled petitioner to an appeal to the Supreme Court of Illinois "as a matter of right."

McMaster, et al. v. *Gould, et al.*, 276 U. S. 284.

Matthews v. *Hume*, 269 U. S. 262.

In considering the *McMaster* case (276 U. S. 284), in its applicability to the case at bar it will be observed that the Supreme Court of New York corresponds in function to the Circuit Court of Illinois in which the judgment under consideration was entered. The Appellate Division of the Supreme Court of New York corresponds to the Appellate Court of Illinois, while the Court of Appeals of New York corresponds to the Supreme Court of Illinois. Section 588 of the New York Civil Practice Act directs the manner in which an appeal may be taken and a case reviewed by the highest court of that state, the Court of Appeals. In certain cases an appeal from the Appellate Division may be taken as a matter of right to the Court of Appeals. In other cases where this cannot be done as a matter of right, a litigant may ask the Appellate Division to certify to the Court of Appeals that a question of law is involved which ought to be reviewed by the Court of Appeals. This proceeding is akin to the certificate of importance provided for by the statute of Illinois, hereinbefore quoted. (Cahill's Rev. Stat., Sec. 120, Chap. 110.) If the Appellate Division refuses to certify the case to the Court of Appeals, the New York Practice Act further provides that then a motion or petition may be addressed to the Court of Appeals asking that court to take the case for review. This proceeding is akin to the petition for certiorari in the Supreme Court of Illinois.

In the *McMaster* case (276 U. S. 284) the petitioners moved the Appellate Division "for leave to appeal to the Court of Appeals." This motion was denied. The petitioners then took an appeal without leave and this was dismissed by the Court of Appeals without opinion. At no time did the petitioner apply to the Court of Appeals for leave to appeal to that court. This court held that it was without authority to review the judgment and the writ was

dismissed for want of jurisdiction, your Honors holding that the case was not one in which an appeal lay as a matter of right under the New York Practice Act and that, "to obtain such a discretionary appeal application may be made to the Appellate Division for leave to appeal, and, in case of refusal, to the Court of Appeals"; and further that "since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest court of the state in which a decision could be had."

In *Matthews* v. *Huce*, 269 U. S. 262, an appeal was taken from the trial court—Court of Common Pleas—of Ohio to the Court of Appeals which affirmed the decrees of the Common Pleas Court. Appeals as of right were then prosecuted to the Supreme Court of the state based on the ground that constitutional questions were presented. The Ohio Supreme Court held that the record showed that the proceeding in the Ohio Supreme Court was filed as of right and that it presented no debatable constitutional question and that the petition should, therefore, be dismissed. Writs of error were then applied for and allowed not to the Supreme Court of Ohio but to the Court of Appeals. Motions were made in the Supreme Court of the United States to dismiss the writs. Under the Ohio practice after the petitions for writs of error as of right were denied, the litigant had the right to apply to the Supreme Court of Ohio for a writ of certiorari to bring the case to that court for its consideration. No such application was made. To deny or grant a writ of certiorari was, under the Ohio practice, discretionary. This court in dismissing the writs of error held:

> "The plaintiffs in error are thus in a dilemma from which they cannot escape. If the supreme court by

> final decree disposed of the constitutional questions on the merits by dismissal of the petition, then the writ of error lay to the supreme court. If it did not, then the decree of the court of appeals did not become that of the highest court to which a writ of error would lie from this court for lack of application for certiorari."

The fact that under the Illinois practice, petitioner had the right to and did apply for a writ of certiorari to the Supreme Court of Illinois without applying for a certificate of importance in the Appellate Court does not alter the situation, since the refusal of the Supreme Court to grant such writ was discretionary with that court. While the limit of time for making application in this court for petition for certiorari runs from the date when certiorari was denied by the Supreme Court of Illinois (*American Ry. Express Co.* v. *Levee*, 263 U. S. 19, 20), nevertheless that court never took the case for review or determination or passed upon its merits. Obviously petitioner, in the instant case, did not exhaust all the remedies or means at hand for obtaining a final judgment or decree by the highest court of the State of Illinois.

The effect of the denial of a petition for writ of certiorari has often been declared by the Supreme Court of the United States. In the case of *U. S.* v. *Carver*, 260 U. S. 482, it is said:

> "The denial of a writ of certiorari imports no expression of opinion on the merits of the case."

We submit that the ruling in the *McMaster* case (276 U. S. 284), *supra*, is decisive of this case, as no final judgment or decree "was ever entered in the highest court" of the State of Illinois. Such judgment might have been obtained if petitioner had applied for and been granted a certificate of importance in the Appellate Court of Illinois.

The Appellate Courts of Illinois frequently grant certificates of importance upon application therefor. In *Wilcox, Admr.* v. *Bierd, et al., Receivers, etc.*, 330 Ill. 571, 575, a certificate of importance was granted by the Appellate Court in a case in which that court affirmed a judgment of the trial court entered on sustaining defendant's demurrer to a declaration in a case brought to recover damages for wrongful death. In *Reivitz* v. *Chicago Rapid Transit Co.*, 327 Ill. 207, a certificate of importance was granted by the Appellate Court after it had affirmed a judgment for $1,500 as damages for personal injuries sustained by Reivitz. In *Rubin* v. *Strandberg*, 288 Ill. 64, the Supreme Court of Illinois reviewed a case involving contract rights after a certificate of importance was granted by the Appellate Court. In *Sherwin* v. *City of Aurora*, 257 Ill. 458, the Supreme Court of Illinois was required to review a judgment of $2,500 rendered in favor of the plaintiff in a personal injury suit, the Appellate Court having granted the defendant's petition for a certificate of importance presented by defendant in that court.

II.

The relation of master and servant existed between plaintiff and defendant within the meaning of the Federal Employers' Liability Act.

In direct examination the plaintiff told all of the circumstances in connection with the obtaining of his employment. In 1912 and in 1917 he underwent abdominal operations. He also had a rupture (R. 17). He gave the railroad company his own references but had another man take the required physical examination. It would be thirty to sixty days from the time he applied for work before he would know definitely whether he was to remain as a switchman and he worked during that period and for fourteen months all together prior to the accident (R. 18). He did regu-

lar switchman's work (R. 19), and there is no word anywhere in the record that his physical condition in any way handicapped him or interfered with his work. In fact there is positive testimony to the contrary (R. 51). When plaintiff was not marked up on the board for work on certain days when there was no work for him, he did other work handling sewer tiling (R. 52). After being rejected by the company's doctors the first time, he applied for work with the same yardmaster that had sent him to the superintendent the first time. He told him he had been rejected as Joe Rock and gave him a slip on which the yardmaster put his name as John Rock—J. J. Rock (R. 92)—and told him to again go to the yard men's office and make this second application, after which he had another man take the physical examination (R. 53, 55). The same day he went to work under the supervision of this same yardmaster and continued under his supervision for fourteen months up until the time he was injured (R. 56). He was known only as Joe Rock while at work there (R. 93).

The defendant's doctor told the plaintiff when he first applied for work, that he had "a light rupture." From the record but one conclusion can be reached and that is that the plaintiff was physically able and competent to do the work that he was employed to do and that he did do it for over a year without any complaint or criticism of any kind. *Defendant concedes and the Appellate Court of Illinois specifically found that the physical condition of the plaintiff in no way contributed to bring about his accident.* Under such circumstances did the plaintiff's failure to comply with the rule requiring him successfully to pass a physical examination before going to work, take away his rights as an employee during the fourteen months of his employment?

It is a matter of common knowledge that under the necessity of obtaining work for the support of themselves and

families, men frequently misrepresent and misstate facts in order to obtain employment. Many industries, particularly railroads, will not employ men under a certain age or over a certain age and hundreds of men seeking such employment with full knowledge that employment will not be obtained if they give their correct age, deliberately misstate the facts. It is also a matter of common knowledge that railroad companies ordinarily will not employ men who have been discharged by other railroad companies or who have brought lawsuits against other railroad companies. Many mercantile establishments will not employ persons unless they have had experience in doing the work in question. The applicant, knowing this, deliberately misstates his qualifications for the work in order to obtain the employment. These practices are mere inducements to the contract of employment and such persons are employees in legal contemplation after they have been put to work and their services have been accepted and paid for by the employer.

The case of *Payne, Director General* v. *Daughtery*, 283 Fed. 353, decided by the Circuit Court of Appeals for the Eighth Circuit, is absolutely in point. It was a suit brought to recover damages for personal injuries sustained by a railroad switchman while at work in interstate commerce. The defendant admitted that the car on which plaintiff was at work when injured was defectively equipped and that it was being moved in interstate transportation, but denied that plaintiff was its employee, because proof showed that the plaintiff "*obtained his position by fraudulent misrepresentations of his former employment and concealing prior injuries, that he was a victim of epilepsy to which his fall was attributed in whole or in part* • • •." In affirming judgment for the plaintiff the court said (Opin. 354):

"(1) A principal contention, embraces in a number of assignments, is that the trial court erred in excluding evidence offered to defeat the action, on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in refusing instructions tendering such defense. In our opinion, the rulings were correct. The complaint is not that proof is incompetent which tended to attribute the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which, even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter. Cases are cited involving different facts, but of contrary import in principle. We regard the decisions such as *Lupher* v. *Atchison, T. & S. F. Ry. Co.*, 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N. S.) 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the Federal Employers' Liability Law (35 Stat. 65, Comp. St., Secs. 8657-8665) and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943, Comp. St., Secs. 8605-8615). And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act. See *Phila., Balt. & Wash. R. R.* v. *Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Chicago & Alton R. Co.* v. *Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. ed. 379; *Spokane & Inland R. R.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. ed. 1125."

In the Kansas case cited in the above decision (*Lupher* v. *Atchison, T. & S. F. Ry.*, 81 Kan. 585, 106 Pac. 284) plaintiff obtained his position by misrepresenting his age. A rule of the company forbade the employment of minors as brakeman and plaintiff, eighteen years of age, knew that, and that he could not obtain employment unless the

defendant believed he was twenty-one. After working several months he was injured and brought suit to recover damages therefor. The trial court directed a verdict for defendant "upon the ground that his misrepresentations in securing his employment prevented the establishment of the relation of master and servant, and that at the time of his injury he was either a trespasser or at most a mere licensee to whom the company owed no other duty than not to injure him wrongfully or wantonly." The Supreme Court of Kansas reversed this ruling of the trial court and in so doing said:

> "* * * the seeker of employment does, it is true, procure his contract by false representations, but having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he receives from it. True, the company could at its option, upon discovery of the deceit, discharge him at any moment (26 Cyc. Law & Proc., p. 989), but even then he would be entitled to compensation for the time he had served, not necessarily at the agreed rate, but according to the reasonable value of his services. *Austee v. Ober*, 26 Mo. App. 665. The relation of master and servant exists in virtue of the one party performing valuable services which are accepted and paid for by the other. If Lupher had arrived at full age before the accident occurred, it would hardly be contended that he was still a trespasser. Yet he would still have been working for the company under a contract he had obtained by misrepresentation. The difference would be that his arrival at majority would have rendered it absolutely impossible that any injury should result to the company from the deception."

On a similar proposition the court in *Lake Shore & M. S. R. Co. v. Baldwin*, 19 Ohio C. C. 338, said (Opin. 341):

> "A large number of cases have been cited where it was held that persons wrongfully upon trains were

trespassers, and not entitled to the protection of the railroad company, and learned counsel for the railroad company insist with great vigor and earnestness that, under the state of facts in this case, Baldwin was a trespasser and wrongdoer; that he procured his employment in the service of the railroad company by false pretense; that he was wrongfully upon the train where he was injured; that, being a wrongdoer and trespasser, the company owed him no duty to provide a safe place for him to work and safe appliances and machinery to do his work. * * * The rule of the Railroad company requiring its employees to be twenty one years of age is a reasonable one, but we cannot agree with counsel that the false statement of Glenn Baldwin as to his age made him a trespasser upon the cars and tracks of the railroad company. * * * putting it as strongly as counsel for the company can put it, that he falsely represented his age to the company, and colluded and connived with George Davis to deceive the company, we still think that, while he was in the actual service of the railroad company, he was entitled to the protection of an employee. The fact that he had misrepresented his age, and the further fact that he was a minor, did not make the contract for service void, but voidable. The railroad company, having been deceived, on the other hand, could terminate it whenever it discovered the deception; but, until one party or the other put an end to the relations, the contract continued to exist."

In *Baker* v. *Beattie*, 222 S. W. 638, the Texas Court of Civil Appeals held that the fact that an injured switchman had made false statements in his application for employment as to his age and as to prior injuries he had sustained did not make void his contract of employment so as to destroy the relation of master and servant.

In *Matlock* v. *Williamsville, etc., Ry. Co.*, 198 Mo. 495, 95 S. W. 849, the same ruling was made under similar facts.

In *Denver & R. G. R. Co.* v. *Reiter*, 47 Colo. 417, 107 Pac. 1100, it was held that although a railroad brakeman had deliberately made fraudulent representations as to his age in order to obtain the employment at which he was at work when injured, nevertheless, "the law is well settled" that the plaintiff by such misrepresentations, believed and relied upon by the employer, was not "thereby barred from a recovery for injuries which he may suffer from the negligence of his employer * * *."

The courts of Illinois have repeatedly held that although a minor misrepresents his age in order to obtain employment, such misrepresentation is not a bar to an action brought to recover damages for injury sustained while such minor is at work under a contract of employment so obtained. It was so held in *American Car & Foundry Company* v. *Armentraut*, 214 Ill. 509.

In *Galveston, H. & S. A. Ry. Co.* v. *Harris*, 107 S. W. 108, 48 Tex. Civ. App. 434, plaintiff recovered judgment as damages for personal injuries sustained by him while at work as a brakeman. His application for employment was in writing and sworn to by him. In it he stated that he had never had any litigation with any railroad company. He was given employment and later sustained the injuries upon which the suit was based. At the time of the trial it appeared that he had had other personal injuries while employed by other railroad companies and that he had brought suit against those companies to recover damages for such injuries. In asking a reversal of the judgment the railway company contended that Harris had practiced a fraud upon it in procuring his employment and that the defendant did not owe to him any duty by virtue of the employer and employee relation. It was admitted, as in the case at bar, that the falsity of the answers made by Harris in his application for employment in no way con-

tributed to his accident or to his injury. Judgment in his favor was affirmed, the court saying that plaintiff's,

> "falsehood did not of itself destroy the contract of employment and exempt appellant from any liability for its negligence toward him. It may have formed a just reason for the rescission of the contract of employment, but did not render his employment null and void. The relation of master and servant was established, and could not be rendered invalid in order to shield the master from the consequences of its negligence."

A similar holding was made in the case of *Kansas City M. & O. Ry. Co.* v. *Estes*, 203 S. W. 1155.

The Court of Appeals of New York in *Hart* v. *New York Central and H. R. R. Co.*, 205 N. Y. 317, 98 N. E. 493, passed on a judgment in a suit brought to recover for the death of a railroad fireman who had misrepresented his age at the time he contracted with the defendant for his employment, and there held:

> "The trial court committed no error in excluding the evidence, as constituting no defense. The misrepresentation of the deceased affected the contract of employment, in the sense that it made it voidable; but it did not affect the relation of master and servant, with respect to the former's obligation under the statute respecting the safety of the persons serving it. Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was actually in its service, and therefore was entitled to the protection of an employe accorded by the law. See *L. S. & M. S. Ry. Co.* v. *Baldwin*, 19 Ohio Cir. Ct. R. 338; *Lupher* v. *Ry. Co.*, 81 Kan. 586, 106 Pac. 284, 25 L. R. A. (N. S.) 707."

An employee who made false statements in writing in order to obtain employment, even though his act in so

doing amounted to a misdemeanor under the New York statutes, was, nevertheless, entitled to receive compensation under the Workmen's Compensation Act of that state. The defense was that no contract of employment existed because of the deceit practiced. The court held that the contract of employment was not void but merely voidable. *Kenny* v. *Union Ry. Co.*, 106 App. Div. (N. Y.) 497.

Defendant cites *Stafford* v. *B. & O. R. R. Co.*, 262 Fed. 807, and a Virginia case,—*Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515. The *Stafford* case was not decided by a reviewing court, but by a district judge on the plaintiff's motion to strike out defendant's special plea setting up the fact that Stafford had secured his employment much as plaintiff did in the case at bar. Plaintiff by this motion contended that the matters set up in the plea had no proper place in determining his rights. The trial court overruled the motion to strike, saying that "a number of questions, such as consent to the substitution (i. e., having someone else take the required physical examination) for example, might arise on trial that could not be determined in advance on this motion to reject the plea." The trial court thought that defendant should be permitted to show all the facts connected with the manner in which plaintiff obtained his employment when the case was called for trial and for that reason allowed the plea to stand. The record of the case shows that a few months after this hearing on the motion to strike the plea, the case was dismissed by the plaintiff. This *Stafford* case did not, therefore, hold that the fraudulent act of Stafford in having a substitute take the physical examination necessary in order that he might obtain employment himself, prevent the relation of master and servant from existing between him and the defendant company at the time he was injured.

The case of *Norfolk & Western Ry. Co.* v. *Bondurant*, 107 Va. 515, does sustain the defendant's contention in the case at bar. If that case is studied it will be observed that it is based upon the decision in *Fitzmaurice* v. *N. Y., etc., R. R. Co.*, 192 Mass. 159, relied upon by defendant in the Appellate Court of Illinois. The facts in the *Fitzmaurice* case, so wholeheartedly adopted by the Supreme Court of Virginia, are in no way analogous to the facts in the *Bondurant* case, or to the facts in the case at bar. Fitzmaurice was a passenger on defendant's road and admitted making fraudulent statements in order to obtain a ticket which but for her fraud would not have been sold to her. The distinction between the *Bondurant* case and the *Fitzmaurice* case is well stated by the Supreme Court of Kansas in the case of *Lupher* v. *Atchison T. & S. Fe Ry. Co.*, 81 Kan. 585, as follows:

> "The substance of the Massachusetts case is that one who uses a railroad ticket obtained at a reduced rate by fraudulent representations is not a passenger in the sense of being entitled to protection as such, and stands in no better position than a mere trespasser. This is the general doctrine, to which there seems to be no dissent. 6 Cyc. Law & Proc. p. 538. The Virginia court took the view that, by parity of reasoning, one who obtains employment from a railway company by a false statement as to his age is prevented by his fraudulent act from becoming an employee. We think the two situations are obviously dissimilar. The analogy is not close enough to warrant the application of the same rule. Among other differences may be noted this: In the one instance a person desiring to be transported from one point to another fraudulently procures the railway company to render him that service, a service which is wholly for his benefit, and in which the company has no interest whatever. He obtains by false pretenses something of value to himself for which he renders no equivalent. In the other the

seeker of employment does, it is true, procure his contract by false representations, but, having obtained it, he begins the performance of service for the benefit of the company, and renders it an equivalent for all that he received from it."

Under the authorities above cited we submit that the relation of master and servant existed in the case at bar between the plaintiff and defendant and that plaintiff's status at the time he was injured was that of an employee under the provisions of the Federal Employers' Liability Act.

The authorities cited by the defendant to the effect that a contract is void where one party enters into it under a mistake as to the identity of the other party, are not applicable to the facts in the instant case. Defendant intended to employ the plaintiff and the plaintiff after the preliminaries incident to his application for employment, did go to work. True, as a part of the inducement to the contract, he did have another man take the physical examination in his stead. In legal contemplation this misrepresentation is the same as any other misrepresentation would have been. Misstatements as to his age, as to whether he had ever been employed by any other railroad company, as to whether he had ever been injured while employed by a railroad company, or as to whether or not he was afflicted with any physical trouble that would incapacitate him from work, are, we submit, in the same category, namely, merely misrepresentation as an inducement to the contract of employment. The authorities collected on pages 17 and 18 of defendant's brief merely hold that fraud in the execution of a contract renders it void *ab initio*. The examination by a physician was but one step towards securing the employment (R. 162) and the employment was not given and a contract of employment was not executed until plain-

tiff went to work. It is the rule that fraud in the inducement to a contract merely makes the contract voidable at the option of the one upon whom the fraud has been practiced.

In Vol. 6, Ruling Case Law, Sec. 52, page 635, this distinction, based upon many cases, is clearly pointed out, as follows:

> "Moreover it is sometimes stated, rather loosely, that fraud avoids all contracts. As a matter of fact, *a contract induced by fraud is not void but voidable* at the option of the party injured by the fraud. A contract entered into by fraud on one side, or mistake through negligence on the other, is not absolutely void. While in one sense it is not the contract of the latter at all, because of his non assent to its terms with knowledge of facts, he may add the element of assent at any time, actually or constructively. Such a transaction is not then, in a legal sense, absolutely void; it is only voidable."

III.

The evidence as to defendant's negligence.

It is elementary that questions of negligence, contributory negligence and assumed risk are for the jury, where from the evidence and from legitimate inferences to be drawn from it, reasonable minds might differ as to the conclusions to be reached. With this in mind what does the evidence show as to defendant's negligence?

The testimony of the plaintiff in the case at bar stands absolutely unimpeached. No statement given to the defendant or to anyone else discloses anything as to the way the accident occurred that would impeach or cast doubt upon the truth of his testimony when on the stand. The accident happened about 8:30 in the evening at a place where dozens of employees cross and recross defendant's

tracks just north of Irving Park boulevard. At this point there was a spur track, two main lead tracks and two main line tracks. Plaintiff and the other members of his crew had been working from 3:00 o'clock in the afternoon of the same day up at the north end of the yard switching cars and making up trains (R. 21). About 8:30 or 9:00 o'clock in the evening they came from the north end of the yard at Lawrence avenue down to a point near the depot just north of Irving Park boulevard where their engine was left standing while they had their lunch (R. 21). They had twenty minutes in which to eat and get back to work. Plaintiff went from the engine standing on the east side of the tracks across the tracks over to his mother-in-law's home, about 300 feet west of the tracks, to eat. He was there about fifteen minutes and on his way back he stopped at the oil house on the west side of the tracks, to fill his lantern (R. 23). After filling and lighting his lamp he started to go back to his engine on the west side of the tracks. His twenty minute lunch period was about up and when he got near to the most westerly tracks he saw a long freight at about Irving Park south of him. It was coming north about three miles per hour (R. 24). The headlight on this locomotive had not been dimmed, contrary to the custom and practice in the yard (R. 24). Plaintiff, seeing this long train coming, and knowing that his crew would be delayed unless he could get across ahead of it, started to do what any ordinarily prudent person would do under the same circumstances, namely, get back to his work, rather than stand idly by while a train of about eighty cars passed him (R. 31). The locomotive was so far away from him that he had ample time to cross in front of it. There was about fifteen feet of space between the track on which the freight train was approaching and the track next east of it. After crossing this track on which the train was

coming he looked both north and south, but could see nothing coming from either direction. As he looked to the south after crossing this first track the bright headlight on this locomotive blinded him so that he did not and could not see some cabooses coming on that track from the south until they were about ten feet away from him (R. 25).

There was no light upon the caboose that struck him and no man riding it as a lookout, and no warning of its approach was given by engine bell, whistle or otherwise (R. 25). He tried to get out of the way, but was knocked down and dragged a distance of thirty or forty feet (R. 25). The caboose that struck him was coupled to another one and was being shoved north by a locomotive to be put in onto a switch track farther north.

Defendant's witness, Hudson, the conductor of the crew moving the cabooses, was about seventy five feet north of where the cabooses stopped after Rock's leg had been crushed (R. 207). They were going to cut these cabooses off from the engine and tender and kick them in onto a switch track. Hudson testified positively that he saw plaintiff cross in front of the locomotive pulling the freight train and keep on going toward the track on which these cabooses were. At the time plaintiff was approaching the track on which the Belt transfer train was on, the cabooses were standing still about 125 feet north of Irving Park boulevard (R. 213), and although Hudson saw plaintiff crossing in front of the Belt transfer engine coming straight toward the track on which these cabooses stood, he, nevertheless signalled the engineer to shove the cabooses north and gave no signal at all of any kind except so to move them, from the time he saw Rock until he was hit (R. 214). He also testified that the engine and cabooses did not move over twenty feet before striking plaintiff (R. 215), and he did

not claim to have heard the engine bell or any other warning signal before the cabooses were moved from where they stood when he signalled for the movement.

This testimony of conductor Hudson relative to the manner in which the cabooses were operated, is clear proof of negligence, for he admitted that switching crews and other employees used that walk across there to go to the oil houses to fill their lanterns; that that happens right along; that he knew that men were apt to be passing there at any time (R. 216). If Hudson, seeing plaintiff crossing that track so as not to be delayed by the passing of the incoming freight train, had refrained from signalling the crew that was handling the cabooses to move even for a few seconds plaintiff would not have been injured. When he gave the signal to move the cabooses north, plaintiff was fifteen or twenty feet west of the track on which the Belt transfer was moving, and, although he was running east toward the track the cabooses were on, Hudson gave no signal to stop the cabooses until the plaintiff went behind the cabooses; that was right when he got on the track (R. 214).

In addition to this negligent act of Conductor Hudson, the defendant was clearly negligent in failing to ring the bell on the engine attached to these cabooses when it started in motion to shove them to the north and in failing to have a lookout or light upon the foremost caboose as it moved over this pathway where employees crossed at all hours. Under the general negligence count of the declaration this proof was admissible. The plaintiff testified specifically that there was no bell or signal from this locomotive or from these cabooses (R. 25). The defendant practically admits the truth of that testimony for no one of its witnesses testified to the contrary.

Plaintiff's witness, Lippman, had worked in that yard as a switchman for almost seven years (R. 59). He testified that in shoving cars and cabooses over the lead track where this accident happened it was the custom and practice for a man to be on the leading car with a light (R. 60). James Eade testified to the same custom and practice when cars were moved over the lead tracks (R. 69). Some of defendant's witnesses admitted this reasonable custom and practice. Yardmaster O'Haire admitted that hundreds of workmen crossed there right along, every week from day to day (R. 86), but refused to call it a path. He also admitted that it was the practice when cabooses were moved from the track south of Irving Park boulevard back over the lead up into the yard, to have a man placed on the rear end of the leading car, for main line movement and for public highways but contended that although trains come into that yard over those lead tracks those tracks could not be called main line tracks (R. 96).

Defendant's witness Ourada, testified that switchmen, railroad men and car repairers crossed that track day and night from the oil houses across to the depot; that he had seen them do it hundreds of times before the accident (R. 136). He said that there was no one riding the head end of the cut of cabooses as he shoved them north over this track, and that although he had but two cabooses coupled to his engine he did not see the plaintiff at all before he was hit (R. 138).

Defendant's witness, John B. Hamilton, testified in direct examination that the universal practice or custom when backing cabooses over this track across Irving Park boulevard, a public highway, then down through this old yard lead track, with the intention of kicking the two cabooses onto a yard track, "is that a white light must be displayed on the front end of the lead car while going

over a crossing and over the main line *back to the yard tracks—the inside tracks*" (R. 152), and then later sought to qualify his statement by making a difference between the two lead tracks at the place where the accident happened that run parallel with and adjacent to the main line tracks and those main tracks.

Witness Banning, called by defendant, testified that in shoving these cabooses along a track at this place, they would have somebody on the hind end looking out, knowing that dozens of employees at all hours of the day and night were crossing over this lead (R. 160).

Jerry O'Conner, a switchman, testified that he had made similar switching movements with cabooses many times and that they *kept a lookout on them* when passing along, just north of Irving Park boulevard, where men cross and re-cross all the time; that it was customary to keep some lookout ahead where these men crossed from the depot and the yard office over to the car repairers' shanty, the oil house and the eating house, when shoving cabooses along there (R. 247).

It is admitted that there was no warning of any kind whatsoever from the caboose train and it is a fair inference that if the slightest precaution had been taken by having a light or a man on the foremost caboose, the cabooses would either not have been moved or could have been stopped in time to have avoided the accident, or the plaintiff could have been warned of their approach. Under the testimony just reviewed, we submit, that the Appellate Court of Illinois was clearly right in holding that (R. 282)

> "Without passing upon the contention of the defendant that the testimony of the plaintiff as to the light is without corroboration in the evidence, nevertheless, if it be assumed that the light was dim, still, as we

read the record, the plaintiff made out a clear *prima facie* case of negligence against the defendant."

Plaintiff testified that bright headlights on locomotive engines were never used under the circumstances and conditions that prevailed at the time he was hurt (R. 45). He admitted that he knew that "once in a while" cabooses were handled without having a lookout man with a light on the foremost end (R. 36). There was no regular time for making this caboose movement (R. 35) and he had no reason to know when he passed in front of the transfer engine with its bright headlight that this particular caboose train would be started from a standing position without warning and without a light or lookout upon it.

Defendant was also charged with negligence in operating the Belt transfer train over this track without dimming the headlight on the locomotive, so that by reason thereof, plaintiff's vision, as he looked down the track was so interfered with that he did not and could not see these unlighted cabooses coming toward him. Plaintiff testified that this bright headlight was on and that *after* he crossed the track on which the transfer train was moving, that *then* he attempted to look to the south and that the rays of the light so dazzled him that he could not see (R. 24). His testimony in this regard is absolutely unimpeached by earlier contrary statements made by him. He is corroborated as to the dazzling headlights by defendant's witness Eicha, fireman on the Belt transfer train, although this witness apparently did not intend to admit the truth of the matter. Eicha testified that as he rode upon this northbound engine, he saw the plaintiff coming across a vacant lot 150 feet west of the track on which his train was running. He testified that it was a dark night. When asked how he could see him so far west of the track, he said that

"a bright light would light it up as clear as day" (R. 145). Immediately after making that statement, when asked what he meant by his answers, he said that he meant *if the bright light had been on it would have lighted it up as bright as day.* He said that he was able to see plaintiff *because plaintiff carried a switchman's lantern* (R. 146)—while just a few minutes before in direct examination he said that when he saw plaintiff coming he was *"not carrying a lantern"* (R. 143). Everyone knows that the ordinary switchman's lantern is used primarily for signalling and that it would not illuminate to any such degree. This same witness testified that the reason he was positive that the bright headlight was dimmed was because it was their practice to dim it every night; that *"they are supposed to do it. I guess many times some of them don't"* (R. 148).

Defendant's witness Ourada also testified that the headlight on the Belt run engine was dim, although he was on another engine and had no particular reason to observe this train on another track. Several months after the accident this witness made a statement to an investigator for plaintiff and in it stated that he did not know whether the headlight on the Belt train engine was dim or bright as he did not notice or see it (R. 249).

Defendant's witness, Fitzgerald, was working at the time as one of the switchmen in the crew that shoved the cabooses. On direct examination he testified that he was *pretty sure* the headlight on the locomotive drawing the other train was dim (R. 185) and on cross-examination admitted that he and the other witnesses had discussed the question as to whether that headlight was dim or bright since the trial had begun and then said that *at this discussion they all agreed about the matter* (R. 190). This same witness, several months before the trial, gave to plaintiff's investigator a statement in which he said "it is a

custom to dim electric headlights in pulling into the yard, but whether or not this Belt drag engine had its headlight dim *I could not say as I did not notice*" (R. 250).

If the testimony of these various witnesses called by the defendant is read it will be observed that most of them who testified that the headlight was dim had no specific recollection of that particular night and that their testimony was based on what *was usually done and what was supposed to be done* in that particular, rather than on any distinct recollection about that particular headlight on that particular night.

With this testimony from witnesses, some of whom were impeached and some of whom admitted that they were testifying from what was "supposed" to have been done rather than what they actually saw done, no rule of law would have justified the reviewing court of Illinois, without opportunity to see and observe the demeanor of the witnesses as they testified, had it set aside the verdict of the jury, approved as it was by the trial judge in entering a judgment upon it.

Defendant's contention on page 37 of its brief to the effect that a light on the foremost caboose and a man placed there as a lookout would have been no avail to plaintiff, is based on mere guess and conjecture. Plaintiff crossed about 75 feet in front of the engine with the bright headlight (R. 24) and if the headlight blinded him it would also serve to make him visible to the lookout man,—had there been one there,—on the rear of the foremost caboose as it was standing on the next track 15 to 17 feet east of the track over which the engine with the bright headlight was moving. A lookout man upon that caboose could have plainly seen plaintiff in ample time to have prevented the caboose train from starting, to have stopped it after it had started, or to have warned plaintiff of its approach.

We submit that it cannot be said that the weight of the evidence as to defendant's negligence is so clearly and manifestly contrary to the finding of the jury and the trial court's action in entering judgment upon that finding, as to warrant a reversal on the weight of the evidence. Courts have so frequently held that a reviewing court ought not to set aside a verdict and judgment on the ground that it is against the weight of the evidence unless it is *clearly, palpably and manifestly so*, that we believe it unnecessary to cite decisions on that subject.

IV.

The law as to defendant's negligence.

There is a clear conflict in the testimony in regard to the custom and practice of posting a lookout man on the forward end of cabooses being shoved along the lead track at the place of the accident, and upon the question as to whether the locomotive headlight on the transfer train was dimmed, in accordance with the admitted custom and practice. The most recent pronouncement of this court where evidence is conflicting is found in *Western & Atlantic Railroad* v. *Nora E. Hughes, Admrx.*, cause No. 234, United States Supreme Court, decided February 18, 1929. There this court said:

> "The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. There was much conflict in the evidence.
>
> "The first trial occupied five days. At the second trial 33 witnesses testified. Some of the testimony given by witnesses for the railroad would, if believed, have entitled it to the verdict as a matter of law.
>
> "Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the

evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

The first count of plaintiff's declaration, as the Appellate Court of Illinois stated, is a general negligence count (R. 282). Under it proof that defendant moved the caboose train without bell, signal or warning and without a man or light at the forward end was admissible. The third count charged negligence in operating an engine with cabooses attached to it over said track without keeping any lookout so as to have discovered the plaintiff crossing the track there, although defendant knew or in the exercise of ordinary care ought to have known that plaintiff and other workmen were or might be crossing at this particular place (R. 5). The evidence establishes beyond any doubt the fact that many employees crossed and re-crossed these tracks at all hours. The evidence is also clear that at this point trains were not made up and broken up and that cars were not switched about at that place; that trains passed there on their way to the north end of the yard; and that the caboose movements along the tracks at this place were comparatively few for the reason that it was only necessary to place one caboose at the south end of each train after it had been made up by the switching work done at the north end of the yard. Under these circumstances the ruling in *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S. 408, 417, is applicable. There it was said:

> "What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men,

under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

In *Koennecke* v. *Seaboard A. L. Ry. Co.*, 101 S. C. 86, 85 S. E. 374 (affirmed 239 U. S. 352), the court was called upon to decide if actionable negligence had been shown in operating a switch engine in a yard without light or signals. The Supreme Court of South Carolina, on page 109 of its opinion, said:

"We cannot assent to the view that, under no circumstances, is it the duty of the crew of a switching engine, moving in a switching yard, to give signals of its approach for the benefit of other employees working in the yard, even though they may know that it is moving about the yard and be under the duty of looking out for it."

In affirming judgment for the plaintiff in this *Koennecke* case (239 U. S. 352) this court distinguished the case from *Aerkfetz* v. *Humphreys*, 145 U. S. 418, and said:

"We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835, but one where the rules of the company and reasonable care required

a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk."

In *Bombolis* v. *Minneapolis & St. L. R. Co.*, 128 Minn. 112, 150 N. W. 385 (affirmed 241 U. S. 211, 60 L. ed. 961), plaintiff's intestate was killed while at work repairing a track. A train signaled its approach on one track and the intestate stepped back near to another track, and was struck by a switch engine that approached without warning of any kind. Judgment for plaintiff was affirmed, the salient points applicable to the case at bar being stated by the state court as follows:

"The negligence alleged and relied on is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warning of the approach of a switch engine whenever there were men working on the track. *We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue.* It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men were getting out of its way. *It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell.*"

In *Lake Shore & M. C. Ry. Co.* v. *Enright*, 237 Ill. 403, a fireman, crossing tracks at a place *where employees*

habitually crossed to get drinking water, was injured when struck by an engine backed up without warning or lights. In affirming judgment for plaintiff the court held that the questions of defendant's negligence and the plaintiff's contributory negligence were for the jury and that under the circumstances "appellant owed appellee the duty of exercising reasonable care and caution not to injure him. • • •"

In *Philadelphia B. & W. R. Co.* v. *Tucker*, 35 App. D. C. 123 (affirmed without opinion, 220 U. S. 608), plaintiff's intestate was fatally injured when struck by a train while crossing defendant's tracks *along a pathway which had long been used by employees* going to and from work. He was aware of the fact that trains and cars might move along these tracks at any time. In affirming a judgment in his favor the court held that whether the defendant had provided a safe "way" for its employees was for the jury, and that the long continued practice of the employees in using this pathway over the tracks "was with the knowledge and consent of the defendant."

Under the Federal Employers' Liability Act upon which the instant suit is based the defendant is liable for any "defect or insufficiency" in its "ways" due to its negligence, and the pathway used by the plaintiff at the time he was injured was clearly a "way" within the meaning of the federal act.

In *Farris* v. *Southern Ry. Co.*, 151 N. C. 483, 66 S. E. 457, the employee was crossing defendant's tracks in the yards proper on his way to work, *and the defendant knew and had for a long time acquiesced in the use of this pathway by its employees.* He was struck by four cars kicked along the track without any warning being given and without anyone riding these cars. A judgment for plaintiff was affirmed.

In *Cincinnati, etc., R. R. Co.* v. *Mayfield's Admr.*, 145 Ky. 305, 140 S. W. 310, the intestate was killed while crossing tracks over *a route habitually used by employees*. The engine that struck him gave no signal and carried no warning lights. Judgment for the administrator was affirmed, the court holding that the defendant should reasonably have anticipated the presence of persons at that particular place, and was negligent in failing to give a warning of the approach of the locomotive engine.

In *Hudson* v. *Seaboard A. L. Ry. Co.*, 176 N. C. 488, 97 S. E. 388, an employee was injured while upon tracks where employes customarily crossed in a crowded yard. He was struck by an engine that sounded no signals and did not have a lookout on it as it backed through the yard. The defendant contended that it was not negligent and that the employee assumed the risk of injury. In the course of its opinion the court cited the *Kocnaecke* case (239 U. S. 352), and the *Pucucker* case (244 U. S. 320), and held that "backing a train without a lookout on the rear end without notice of its approaching along a track which employees and others are accustomed to pass over, is negligence" and that it was for the jury to say whether harm or injury to someone might be anticipated as a result of the failure to have a lookout at the rear of the backing engine so that the employee could have been seen and warned.

In *Westcott* v. *Chicago, G. W. R. R. Co.*, 157 Minn. 325, 196 N. W. 272, defendant's employees had crossed and recrossed tracks in defendant's yard in the neighborhood of the roundhouse for so long a time that, as the court said, "a jury might well find that appellant knew of it and consented to it." Plaintiff's intestate was on his way to the roundhouse, crossing *the tracks at the customary place*, when fatally injured by some cars kicked, without warning, in upon one of the tracks. In affirming a judgment for

plaintiff and in answer to defendant's contention that there was no negligence shown, the court held that the notice of the custom of employees to cross the tracks at this place was imputable to the defendant and that it was its duty to use ordinary care to protect employees crossing at that point from injury.

In *Lexington & E. Ry. Co.* v. *Smith's Admr.*, 172 Ky. 117, 188 S. W. 1091, Smith was struck and killed in a yard at a point *where employees "were constantly passing to and fro* and engines and trains constantly moving about." Defendant failed to have anyone riding on the front end of a caboose that was backing along the track so as to give warning. In answering the defendant's contention that it was not guilty of negligence the court stated that it "is very plain that if there had been some person for example, the brakeman, who was on the engine pilot on the front end of this caboose, he could have warned Smith in time to have enabled him to leave the track before being struck"; and that if Smith was guilty of contributory negligence on standing on the track so was the defendant guilty of negligence in failing to have some person on the front end of the caboose; that this joint and concurring negligence of both parties brought about the death of the employee.

The Supreme Court of Missouri, in *Greenwell* v. *Chicago, M., St. P. Ry.*, 224 S. W. 404, affirmed a judgment for an engineer who was injured while on his way across the tracks in a yard to the depot where he was to obtain a certain bulletin. *Employees were obliged to and frequently did cross the tracks at this place.* In answering the railroad company's contention that it was not guilty of negligence in failing to warn or in failing to have a man at the foremost end of the car that was being backed up and which struck plaintiff, the court said:

> "Where employees are expected to be passing across tracks, such as the plaintiff crossed in this case, it is the duty of those running trains or engines along that way to look out for danger to such persons and give appropriate warning to prevent injuring them."

Practically all of the foregoing cases cited, pass upon the duty of a railroad company to its employees who customarily and habitually cross yard tracks at a given place and under circumstances such as appear in the case at bar. In some of the following cases it is not clear from the opinions and the facts stated therein whether the employee was crossing tracks under circumstances such as confronted the plaintiff in the present case. We submit, however, that the principles announced in them are pertinent to the issues here presented. One of them is *Frazier* v. *Interstate R. R. Co.*, 264 Fed. 96 (Court of Appeals, Fourth Circuit). There an interstate switchman, after making a coupling between two cars stepped back upon an adjacent track and was struck by an engine with a freight car in front of it, which came upon him without warning, and without a light upon the car. The declaration alleged all of these facts and the trial court sustained defendant's demurrer on the authority of *Aerkfetz* v. *Humphries*, 145 U. S. 418, 36 L. ed. 758. Plaintiff stood by the demurrer and took the case up for review. The Circuit Court of Appeals reversed the trial court and in so doing said (Opin. 98):

> "Both authority and reason are against the proposition that the crew of a switch train, or any other train, can be judicially declared as a matter of law to be without fault in running along an adjacent track under such conditions as here appear, without showing a light or sounding a bell or whistle or having a lookout. Upon proof of the allegations of the declaration, it will be for the jury to say whether the proximate cause of the casualty was solely negligence of the defendant, or of the plaintiff, or the two combined, or inevitable acci-

dent. Among the cases sustaining this conclusion we cite: *Norfolk & Western Ry.* v. *Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. ed. 1096, Ann. Cas. 1914C, 172; *Chicago, Rock Island Ry.* v. *Wright*, 239 U. S. 548, 36 Sup. Ct. 185, 60 L. ed. 431; *Erie R. R. Co.* v. *Purucker*, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. ed. 1166; *Toledo, St. L. & W. R. Co. et al.* v. *Bartley*, 172 Fed. 82, 96 C. C. A. 570; *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488; *Southern Ry. Co.* v. *Darnell's Admx*, 114 Va. 312, 76 S. E. 291; *Harwick* v. *Wabash R. Co.*, 181 Mo. App. 156, 168 S. W. 328. Reversed."

In *Delaware L. & W. R. Co.* v. *Hughes*, 240 Fed. 941, the Circuit Court of Appeals, Second Circuit, affirmed a judgment for the death of a railroad switchman killed while at work in defendant's yards. The intestate was an experienced man and thoroughly acquainted with the premises. He was hit by a moving car which plaintiff's evidence showed was "*improperly managed in that there was no watchman at or near to its end with a signal lantern to warn those who had a right to be on the track of an approaching car.*" In holding the defendant negligent the court said that although the accident happened in the yard limits, "it was the duty of the defendant to give adequate warning of the approach of the car" and quoted with approval the syllabus in *Southern Ry. Co.* v. *Smith*, 205 Fed. 360, 123 C. C. A. 488, as follows:

> "While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines to keep such lookout as is reasonably necessary to avoid injury to an employe who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case."

In *Union Pacific Ry. Co.* v. *Elliott*, 54 Neb. 299, 74 N. W. 627, it was said that, (Opin. 305)

> "Irrespective of a statute, the starting or running of a switch engine, in a switchyard filled with a network of tracks upon which cars and engines are constantly moving and in which yard men are constantly at work, without the ringing of a bell or blowing of a whistle, is evidence of negligence."

In *Kalashian* v. *Hines, Director General*, 171 Wis. 429, 177 N. W. 602, plaintiff sought to recover damages under the Federal Employers' Liability Act for injuries he sustained while crossing defendant's tracks at a place where he knew switching operations were in progress. He was struck by a switch engine *as it moved from a standing position about sixty feet away from him without any warning.* The court affirmed the judgment for him, stating that the questions whether defendant was negligent and whether the plaintiff was guilty of contributory negligence that would mitigate damages under the Federal Act, were for the jury.

V.

Defendant was negligent in failing to dim the locomotive headlight.

Defendant practically admits that it would be negligence to operate a transfer engine at the place and under the circumstances in question without having the headlight upon it dimmed, in accordance with the admitted custom and practice. Defendant's witness Eicha corroborated plaintiff on the headlight question when he stated that he saw the plaintiff before he reached the tracks and some distance away, even though the night was dark, the witness stating that "a bright light would light it up as clear

as day" (R. 145). Other witnesses called by defendant, as heretofore pointed out, did not know whether the headlight was bright or dim, while others said that it was dim because it was customary to dim it upon entering the yard and that they had no particular recollection on the question as to this particular night. Under the law, as stated in *Chicago, M. & St. P. Ry. Co.* v. *Coogan*, 271 U. S. 472, 474, this court will only reverse a case where from an examination of the record, "it is found that *as a matter of law* the evidence is not sufficient to sustain" a judgment.

There is no denial of the general custom and practice by virtue of which locomotive headlights were dimmed when approaching the place where plaintiff was injured. The substance of defendant's argument is that this court should say that the jury, the trial court and the reviewing court of Illinois, should have believed the testimony of its employees, instead of the testimony of plaintiff, and his witnesses.

In *Roach* v. *Great Northern Ry. Co.*, 133 Minn. 257, 158 N. W. 232, a judgment was affirmed for the death of a switchman who was run over by a car shunted onto a side track by a switching engine, the accident being due to the fact that he was blinded by the rays from a bright headlight such as is used upon engines in road service. The court there said:

> "Whether such use constituted negligence was submitted to the jury. The evidence is that such a headlight blinds and dazzles the eye so that one is unable to see objects distinctly or measure distances accurately. This is common knowledge. Switchmen work on and about the cars and engines in the yard and must be able to see clearly and to measure distances accurately. We are of the opinion that the jury's finding of negligence is supported by the evidence."

VI.

The evidence on the question of assumed risk and the law applicable thereto.

Much of the argument advanced by defendant confuses the doctrine of assumed risk with that of contributory negligence. If plaintiff, seeing this approaching train with the locomotive headlight undimmed, acted carelessly in crossing in front of it, such conduct on his part would amount to contributory negligence only and the assumed risk doctrine would not apply. He certainly was aware of the defendant's negligence in failing to dim the headlight, but he did not know and he was not called upon to anticipate that there would be a negligent movement of a locomotive with cabooses attached to it on the next track. He had no knowledge that the defendant would start and move these cabooses that had been standing there attached to a locomotive engine, without ringing the bell or without having a light upon the foremost caboose and a man riding it to give warning to employees who habitually crossed there. The burden of proving that plaintiff knew and appreciated the danger to be incurred on the track upon which he was hit was upon the defendant under the governing decisions of this court in construing the Federal Employer's Liability Act.

This court has repeatedly held that before a plaintiff can be barred on the ground of assumed risk as a matter of law, the danger to him must have been so *imminent and immediately threatening* that no reasonably prudent man under the same circumstances and conditions would have confronted it. *Seaboard Air Line* v. *Horton*, 239 U. S. 595.

In the case at bar it cannot be said as a matter of law that the danger to plaintiff in crossing these tracks as he did, was so imminent and so immediately threatening that a reasonably prudent man would have remained away from

his work and his crew awaiting him while a train of eighty cars moving at three miles per hour passed him. Figuring the average length of a car as forty to forty-five feet (R. 229), this approaching train of eighty cars was over a half mile long. All the witnesses agree that it was moving from three to five miles an hour. It would have taken over a half hour for this train to have passed. Plaintiff's twenty minute lunch period was about up and he did what an ordinarily prudent employee would have done in crossing in front of this oncoming train with the undimmed locomotive headlight and which would have delayed him a half hour if he had waited for it to pass. The cabooses offered no danger while standing there and if the bell on the engine that shoved them north had sounded or any lookout at all had been kept, as plaintiff had a right to assume would be done in accordance with the usual custom and practice, the accident would have undoubtedly been avoided.

In *Erie Railroad Company* v. *Purucker, Admx.*, 244 U. S. 320, the employee, a track laborer, sustained fatal injuries as he was walking along defendant's double track line on his way to work. In order to let a train pass over the track upon which he was walking he stepped upon the other track and was struck by an engine backing over that track. There was no signal or warning from the backing engine and the engineer and fireman did not see the man before he was struck. Recovery was affirmed, the principal point decided by this court being that since the undisputed testimony was to the effect that the engine ran into the intestate without signal or warning to him, that then,

> "Under such circumstances the injured man would not assume the risk attributable to the negligent operation of the train, if the jury found it to be such, unless the consequent danger was so obvious that an ordinarily prudent person in his situation would have observed and appreciated it."

In *Chesapeake & O. R. R. Co.* v. *De Atley*, 241 U. S. 310, the plaintiff in the line of his duty was required to board a moving train, and defendant's engine men knew that he was obliged to get aboard as it passed him. On review in this Court it was contended that he assumed the risk of injury in getting on the train and that if it was "moving slowly the risk is an ordinary one incident to the business of railroading; while if it is moving rapidly, the risk is open, obvious and apparent." This Court said on page 317 of the opinion:

> "We are unable to concur in the view that there was no question for the jury. Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence. If the jury should find, as in fact they did find, that the speed of the train was unduly great, so that the risk of boarding the engine was an extraordinary risk, the question whether plaintiff assumed it then depended upon whether he was aware that the speed was excessive, and appreciated the extraordinary danger; or, if not, then upon whether the undue speed and consequent danger to him were so obvious that an ordinarily prudent person in his situation would have realized and appreciated them. * * *."

In *Gila Valley, etc. Ry. Co.* v. *Hall*, 232 U. S. 94, the plaintiff was injured by reason of a defective third wheel, or pony wheel on a three-wheeled railway gasoline track velocipede. The defect in the flange of the pony wheel was in plain sight and because of it the car was derailed and the plaintiff injured. There was no promise to repair made by defendant or peremptory order to the plaintiff to use this car. In affirming a judgment for the plaintiff this court stated that a verdict "could not properly have been di-

rected for defendant upon the ground that plaintiff, in using the car, had assumed an obvious risk * * *." In the course of the opinion it was said (page 102):

> "Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances would have appreciated it."

Further in the course of the opinion it appears that the defendant had asked the trial court to give an instruction to the effect that it was the duty of the plaintiff to exercise ordinary care to have discovered this defect, and that if he had not done so he should be held to have assumed the risk. This court said that the instruction asked was properly refused and that the one given in which it was said that,

> "The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances,"

was a correct statement of law.

In *Central R. R. Co. of N. J.* v. *Colasurdo*, 192 Fed. 901, the plaintiff was at work in the night time repairing a switch in defendant's yards, and was injured when struck by certain unlighted cars, as they were kicked back along the track without warning. In affirming judgment for plaintiff, the court refused to hold that although plaintiff knew cars might be moved over this track, he assumed the

risk of such movement being made without warning. The court said:

> "We cannot believe that the risk of being injured in this manner, while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant."

The Supreme Court of Nebraska, in *Engel* v. *C. B. & Q. R. R. Co.*, 111 Neb. 21, 195 N. W. 523, following the rule announced in *Chesapeake & Ohio Railroad Co.* v. *DeAtley*, 241 U. S. 310, affirmed a judgment in favor of the administratrix of an employe who was killed in the yards when struck by an engine backed along one of the tracks. The court found from the evidence that the defendant and its employees on the locomotive "knew that deceased and the gang of men under him were constantly crossing and recrossing the tracks at the place where the accident occurred, and that locomotives were traveling backward and forward on the many tracks in the yard; and that the deceased in doing such work, knew that the tracks were a place of danger at all times." As in the case at bar, no warning of the approach of the engine was given, and no one on it saw the plaintiff. The court in affirming the judgment, said (Opin. 32):

> "It was the duty of deceased to watch for dangers and protect himself against them, if possible, and to exercise great vigilance in looking out for approaching engines and trains, but it was also the duty of the rail-

road company and its employees to use due care and caution for the safety of the employees; and where a railroad company knows that its employees are engaged in work on or about its tracks, it is its plain duty to maintain a careful lookout for such employees to prevent injuring them. Because the deceased had been employed by the railroad company for 22 years, a part of which time as foreman of a gang of men, and was aware of the many dangers incident to such employment, these facts did not authorize the railroad company to operate its engine and tender negligently and without regard to his safety or without using the ordinary care which an individual is obliged to use, under like circumstances, for the protection of his employees. The deceased had a right to presume that those operating the locomotive would use proper care and caution for his safety, that they would maintain a careful lookout to prevent injuring him, and that they would take the reasonable, ordinary and usual precautions necessary to protect him in his employment. It cannot be claimed that under the Federal Employers' Liability Act an employee assumes the risks of the negligence of the employer or of the employer's employees or agents, at least until knowledge of the particular negligence which caused or was liable to cause the injury is brought to his attention."

The case of *Indiana, I. & I. R. R. Co.* v. *Ottstot*, 212 Ill. 429, was decided prior to the enactment of the Federal Employers' Liability Act. Plaintiff, while repairing a track, was injured when struck by a backing locomotive moved without warning. Defendant claimed there was no evidence of its negligence, and that the plaintiff was guilty of contributory negligence, and had assumed the risk of injury from moving trains and engines. Plaintiff knew that the engineer in charge of this particular engine had frequently moved engines along the tracks there without sounding the whistle or ringing the bell, and defendant claims that, know-

ing of this negligence on the part of the engineer, plaintiff assumed the risk of injury by reason of it. In affirming judgment for plaintiff, the court said (Opin. 434):

> "While appellee knew that Munaw moved the engine through the yards with bell and whistle both silent, we do not think it can be said, as a matter of law, that he thereby assumed the risk that Munaw would deliberately start an engine and run it upon men who he knew were working on the track at a point not more than two hundred feet from the starting place of the engine, without giving them any warning whatever."

Reasonably it cannot be said that the plaintiff, in the instant case, assumed the risk of this caboose movement when the locomotive engine attached to those cabooses started up from a position, according to defendant's conductor, Hudson, not over thirty-five feet away from where plaintiff was crossing, without sounding any warning or giving any signal of its start or of its approach, and when plaintiff did not know or have a reason to believe such a negligent movement was about to be made. He could not assume the risk of defendant's negligence until he knew of that negligence, and appreciated the dangers arising by reason of it.

In *Roach* v. *Great Northern Ry. Co.*, 133 Minn. 257, 158 N. W. 232, a switchman was fatally injured when blinded by a bright locomotive headlight in a switching yard. A judgment for the administratrix was affirmed, the court holding that:

> "The deceased had worked in the yards and about such headlights for a considerable time. The defendant claims that as a matter of law he assumed the risk of their use. The question of the assumption of risks was submitted to the jury and its finding negatived such assumption. While the deceased must have been aware of the kind of headlight used or at least that it was a bright, strong light, we are not prepared

to say that as a matter of law he appreciated the danger and assumed the risk. The question was for the jury."

VII.

Cases relied upon by defendant.

Defendant relies principally upon two cases, *Aerkfetz v. Humphreys*, 145 U. S. 418, and *Toledo, St. Louis, Western Railroad Company* v. *Allen*, 276 U. S. 165. It is our position that the facts in each of those cases are so materially different from the facts in the case at bar, as to make them inapplicable.

The *Aerkfetz* case was not predicated upon the Federal Employers' Liability Act. Aerkfetz was a track laborer in the yards where there were twelve tracks and side tracks. The court specifically states that "the yard was used for the making up of trains. A switch engine was employed therein and, as might be expected, *was constantly moving forwards and backwards, changing cars and making up trains.*" Aerkfetz was injured by this engine pushing two cars slowly along the track so that they struck him as he stood with his back to the approaching cars. There was no evidence whatever of a violation of the custom as in the case at bar.

Plaintiff in the case at bar was not injured at any such place. While within the yard limits, nevertheless there were but five tracks at the place of the accident, one being a spur known as the ice-house track, the others being two main line tracks and two lead tracks. The work of plaintiff and his crew was done "at the north end of the yard, switching cars and making up trains" (R. 21). About 8:30 in the evening they left their work up there and came down to the depot at the south end of the yard, shown in Defendant's Exhibit No. 1 (R. 78). Plaintiff walked to

the west across the tracks where he ate his lunch, and was injured while on his way back across the tracks to rejoin his crew. The record specifically shows that "trains are not made up there" (R. 74)—namely, at the south end of the yard. The tracks there were traversed by the main line through trains and transfer trains that pulled into the yard over the lead tracks on their way to the north end of the yard. Cabooses were moved over the tracks when needed to put upon the south end of the trains that had been made up on the yard tracks and which yard tracks started, according to the scale on Defendant's Exhibit No. 1 (R. 78), some distance north of the place where plaintiff was injured. There were thirteen or fourteen of these yard tracks. A far different situation is thus presented than that in the *Aerkfetz* case where a track laborer was injured while working upon one of twelve yard tracks where a switch engine "was constantly moving forward and backward changing cars and making up trains."

In *Toledo, St. Louis & Western Railway Company* v. *Allen*, 276 U. S. 165, the plaintiff was a car checker in its yard. There were a number of switch tracks that branched off from a lead track and cars *were constantly being kicked over the lead track in upon these various switch tracks in the process of making up and breaking up trains.* Allen's duties required him to be down among these switch tracks and as the court said "to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains." At the time of the accident he was checking a string of cars on track No. 5 and was between it and track No. 4, and about 125 yards from the lead track. A switching crew was at work in the yard and an engine with twenty or twenty five cars attached to it was on the lead track. Some of these cars were kicked in onto track 4 and allowed to

move by their own momentum down along track 4. They struck the plaintiff as he was down 125 yards from the lead track at work as stated between track 4 and 5. Plaintiff knew that cars were constantly being kicked in upon these various tracks and he also knew that cars "were liable to be shunted without warning to him. This court specifically found that there was no violation of a custom or practice, for in the course of the opinion (page 171) it is stated that "in the absence of proof that he was exposed to some unusual danger *by reason of a departure from the practice generally followed*, it cannot be held that defendant was in duty bound to give him a warning."

A mere statement of the facts in the *Allen* case is sufficient, we submit, to differentiate it from the case at bar, where plaintiff was walking across tracks at a place where employees at all hours crossed on their way from the depot and defendant's offices, east of the tracks, over to the oil house, the restaurant and the car repairers' shanties, west of the tracks, and where there is abundant evidence of a violation of the custom and practice as to locomotive headlights, and as to a lookout and light on the forward caboose.

VIII.

Weight to be given concurring opinions of trial and Appellate Courts.

Bearing in mind that the trial court held the evidence in this case sufficient to go to the jury and that the Appellate Court concurred in the opinion of the trial court, the following statement in *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658, is especially applicable:

> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact; and that ordinarily

negligence is so far a question of fact as to be properly submitted to and determined by them. *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748.

Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the Judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

In the *Patton* case the trial court directed a verdict in favor of the defendant and this action was approved by the Appellate Court and later by the Supreme Court.

In the case of *The Supreme Lodge K. of P.* v. *Beck*, 181 U. S. 49-50, the trial court refused to direct a verdict in favor of the defendant and its action was affirmed by the Appellate Court. When the case came before the Supreme Court of the United States, Mr. Justice Brewer, speaking for the court, said:

"We have recently had before us a case, coming like this from the trial court through the Court of Appeals (*Patton* v. *Texas & P. Ry. Co.*, 179 U. S. 658, *ante* 361, 21 S. C. 275), in which the action of the trial court in directing a verdict was vigorously attacked as an in-

vasion of the province of the jury to determine every question of fact. That case stands over against this, for there the trial court directed a verdict. Here it refused to direct one. In each case its action was approved by the Court of Appeals. In that case, although the question was doubtful, we sustained the rulings of the lower courts, and the considerations which then controlled us compel a like action in the present case."

It is to be noted that the court in the *Beck* case seemed to be of the opinion that in the *Patton* case "the question was doubtful"—being the question of the right of the court to direct a verdict for the defendant—but its action was sustained because of the fact that it was concurred in by the lower Appellate Court.

In the absence of clear and palpable error, this court will not disturb the concurrent findings of trial and Appellate Courts of the states upon the mere sufficiency of the evidence concerning negligence and assumption of risk in a case under the Federal Employers' Liability Act.

Baltimore & Ohio R. R. Co. v. *Watacre*, 242 U. S. 169.

Great Northern Ry. Co. v. *Knapp*, 240 U. S. 464.

Erie R. R. Co. v. *Welsh*, 242 U. S. 303.

Seaboard Air Line v. *Padgett*, 236 U. S. 668.

If this court should hold that it has jurisdiction in this cause and that the writ of certiorari was not improvidently granted, then we submit that the relation of master and servant did exist between the plaintiff and the defendant; that there is in the record sufficient evidence of defendant's negligence to support the judgment; and that the question of plaintiff's assumption of risk was properly submitted to the jury.

We ask that the case be dismissed for want of jurisdiction; or, if jurisdiction exists, that the judgment for plaintiff be affirmed.

Respectfully submitted,

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